CORRECTED COPY

SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JAN 10 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 623

FRED S. CALHOUN, *et al.*,

Petitioners,

—v.—

A. C. LATIMER, *et al.*,

Respondents.

PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONSTANCE BAKER MOTLEY
JACK GREENBERG
10 Columbus Circle
New York 19, New York

E. E. MOORE
Suite 201
175 Auburn Avenue, N. E.
Atlanta, Georgia

DONALD L. HOLLOWELL
Cannolene Building (Annex)
859½ Hunter Street, N. W.
Atlanta, Georgia

Attorneys for Petitioners

NORMAN AMAKER
A. T. WALDEN
J. LEVONNE CHAMBERS
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

FRED S. CALHOUN, *et al.*,

Petitioners,

—v.—

A. C. LATIMER, *et al.*,

Respondents.

PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Although the Fifth Circuit has ruled in *Augustus* v. *Board of Public Instruction of Escambia County*, 306 F. 2d 862, that the redrawing of school zone lines on a nonracial basis is a minimum requirement in every school desegregation plan, respondents say on page 11 of their brief in opposition, "We would still oppose the drawing of school zones by a Court or even the school authorities". This minimal requirement for desegregation has been adopted by the Sixth Circuit, *Northcross* v. *Board of Education of Memphis*, 302 F. 2d 818, and the Fourth Circuit. *Jones* v. *School Board of City of Alexandria*, 278 F. 2d 72, 76. The majority opinion below does not require Atlanta to follow the *Augustus* case in this respect. It was for this reason that Judge Rives in his dissenting opinion characterized the majority opinion as a step backward for the Fifth Circuit.

The obvious reason for this minimum requirement is the eventual elimination of initial assignments to schools based on race with Negro children thereafter enjoying only an opportunity to apply for transfer out of a Negro school into a white school. *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491 (5th Cir. 1962). However, there being no directive in the majority opinion to the Atlanta school authorities to abolish the dual zones, which respondents now admit exist (see pp. 11-12 of Respondents' Brief), the Atlanta plan is still one providing for initial racial assignments and dual zones. Another setback for the Fifth Circuit.

Respondents read into the majority opinion below a requirement that beginning in September 1964 (when the present plan will be effective as to grades 8-12, in that it will permit students in these grades to apply for transfer to other schools) every child in grades 8-12 will have the right to attend the school nearest his home. Petitioners do not so read the opinion of the majority. The majority opinion requires only that the present pupil assignment criteria of the plan be applied to all students entering the high schools for the first time (eighth grade where the feeder system takes hold) and to all students new to the system entering a desegregated grade and to first grade pupils when the plan eventually reaches that grade (Appendix to Petition 22a and 40a). There is no ruling that pupils in grades 9-12 are now entitled to attend the schools nearest their homes, as claimed by respondents. A further setback for the Fifth Circuit.

The crucial fact which cannot be gainsaid is that three years of desegregation in Atlanta, one of the largest cities in the south, has resulted in less than 150 Negro children out of a total school enrollment of approximately 106,000 (57,500 white and 48,000 Negro) transferring to white schools without any order from the District Court or the

Court of Appeals to speed the desegregation process. Moreover, the majority opinion approves a grade-a-year pupil assignment plan, still another setback for the Fifth Circuit, *Boson* v. *Rippy*, 285 F. 2d 43 (5th Cir. 1960), which has brought about this meager result and does not require any speeding up of the plan despite this Court's clear admonition to the District Court, *Watson* v. *City of Memphis*, 373 U. S. 526, and *Goss* v. *Board of Education*, 373 U. S. 683.

Respondents say that the atmosphere in Georgia has changed from one of massive resistance to acceptance of this Court's decision in the *Brown* case, and for this reason certiorari should be denied in this case. Yet, it should be clear to all that in former massive resistance states the only way to insure compliance with the Fourteenth Amendment against interference by either state officials, *Cooper* v. *Aaron*, 358 U. S. 1, or individuals, *Hoxie* v. *School Board*, 137 F. Supp. 364 (D. C. Ark. 1956), aff'd 238 F. 2d 91 (8th Cir. 1956) is to insulate school authorities against such interference by the orders of lower federal courts. The school desegregation record throughout the south to date makes plain that so far only constant pressure brings progress, notwithstanding the good faith of the school authorities. And as the Fifth Circuit said in *Borders* v. *Rippy*, 247 F. 2d 268, 272: "Faith by itself, however, without works, is not enough. There must be 'compliance at the earliest practicable date' ".

CONCLUSION

For the additional foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CONSTANCE BAKER MOTLEY
JACK GREENBERG
10 Columbus Circle
New York 19, New York

E. E. MOORE
Suite 201
175 Auburn Avenue, N. E.
Atlanta, Georgia

DONALD L. HOLLOWELL
Cannolene Building (Annex)
859½ Hunter Street, N. W.
Atlanta, Georgia

Attorneys for Petitioners

NORMAN AMAKER
A. T. WALDEN
J. LEVONNE CHAMBERS
Of Counsel